STATE OF MICHIGAN

COURT OF APPEALS

RONALD STUART MONCZUNSKI,

Plaintiff-Appellee,

v

ASHLEY LYNN SHELTON,

Defendant,

and

MATTHEW BOWLING,

Intervenor-Appellant.

UNPUBLISHED
February 25, 2014

No. 316619
Oceana Circuit Court
LC No. 12-009421-DP

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Intervenor Matthew Bowling appeals as of right the May 14, 2013 order denying him revocation of an affidavit of parentage that provided that plaintiff Ronald Stuart Monczunski and defendant Ashley Lynn Shelton are the biological parents of the minor child. For the reasons set forth in this opinion, we affirm.

Before Easter 2008, Bowling was in a relationship with Shelton. Shelton found out that she was pregnant with the minor child on the day of Easter in 2008. Subsequently, Shelton began a relationship with Monczunski.

The minor child was born on January 15, 2009. On January 20, 2009, the local registrar filed two certificates of live birth. One certificate indicated that Shelton was the minor child's mother but did not include the name of the minor child's biological father. The second certificate indicated that Monczunski and Shelton were the minor child's biological parents. The record supports that after the minor child's birth, Monczunski and Bowling each believed that he was the minor child's father.

However, until July 2012, the only thing Bowling did to assert his parentage was attempt to talk to Shelton. Bowling failed to get in touch with Shelton, and the only contact he had with Shelton was in a telephone conversation approximately a year after the minor child was born.

That conversation ended with Shelton and Bowling arguing. Meanwhile, Monczunski spent most of that time living with Shelton and raising the minor child as the child's father.

On July 5, 2012, Monczunski filed his complaint to establish paternity, custody, parenting time, and child support. On July 31, 2012, the trial court entered a temporary order granting Monczunski sole legal and physical custody of the minor child.

During August 2012, an affidavit of parentage was filed with the Michigan Department of Community Health. The affidavit purported to have been signed by Monczunski on July 16, 2012 and by Shelton on August 2, 2012. The affidavit provided that Monczunski and Shelton were the minor child's biological parents.

On September 27, 2012, Bowling moved the trial court to intervene in the case and for a DNA test to determine paternity in regard to the minor child. In that motion, Bowling alleged that he and Shelton had a romantic relationship before Shelton and Monczunski got together, and that he, not Monczunski, was the minor child's biological father. Bowling attached an affidavit from Shelton supporting his allegations.

On November 8, 2012, Shelton, the minor child, and Bowling participated in DNA testing. The test established that the probability that Bowling was the minor child's biological father was 99.99999997 percent.

On March 5, 2012, the trial court held an evidentiary hearing in regard to the parties' motions for child custody, parenting time, and child support. Monczunski testified that he signed the affidavit of parentage on July 16, 2012. Monczunski did not remember whether he brought the affidavit to a notary to notarize. Monczunski denied forging either Shelton's signature or the notary's signature on the affidavit of parentage. Monczunski did not have any knowledge of whether Shelton signed the 2012 affidavit of parentage. In response, Shelton testified that she never signed the 2012 affidavit of parentage. Additionally, while the affidavit indicated that Shelton signed it on August 2, 2012 in Hart, Michigan, Shelton claimed that she was in Oklahoma at that time. Shelton said that her purported signature on the affidavit of parentage was not her handwriting.

On March 6, 2013, Shelton filed a brief asking for the revocation of the affidavit of parentage and asking the trial court to find that it was in the minor child's best interests that she and Bowling receive custody of the minor child.

On May 14, 2013, the trial court issued its opinion. The trial court recognized that an affidavit of parentage existed in this case that was purportedly signed by Monczunski, Shelton, and a notary. The trial court noted that Shelton and Bowling contested the authenticity of the affidavit, but found that none of the parties produced any documented evidence apart from their testimony that the affidavit was fraudulent, and that the notary was not called as a witness. Further, the trial court found that there were two certificates of live birth in this case, one that identified Monczunski as the minor child's biological father and one that did not. Accordingly, the trial court concluded that "[b]ased upon the evidentiary record as a whole, including sworn testimony and the exhibits received at the hearing, I find that there is not sufficient evidence to establish that the certified affidavit of parentage is fraudulent or invalid."

Regardless, the trial court found that it had the power to revoke the affidavit of parentage under MCL 722.1437(2)[1] because Bowling was the minor child's biological father and there was mistake of fact that Monczunski was the father. On that basis, the trial court concluded that it had the authority under MCL 722.1443 to revoke the affidavit of parentage, make a determination of paternity, and enter an order of filiation. However, the trial court also concluded that under MCL 722.1443(4) a court "may refuse to grant relief and not enter an order of filiation if such an order would not be in the best interest [sic] of the children." The trial court addressed the best-interest factors in MCL 722.1443(4) and found that Monczunski had shown by clear and convincing evidence that it was not in the minor child's best interests to revoke the affidavit of parentage in this case. The trial court refused to enter an order of filiation in favor of Bowling and denied Shelton's motion for custody of the minor child. This appeal then ensued.

Bowling first argues that the trial court erred in finding that the affidavit of parentage was a valid acknowledgment of parentage. "Generally, this Court reviews for clear error the trial court's factual findings in proceedings involving the rights of children, and reviews de novo issues of statutory interpretation and application. The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake." *In re Moiles*, 303 Mich App 59, 65-66; 840 NW2d 790 (2013). MCL 722.1003(1) provides that "[i]f a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." MCL 722.1003(2) provides that an acknowledgment of parentage form is valid and effective if it is "signed by the mother and father and those signatures are notarized by a notary public authorized by the state in which the acknowledgment is signed." In this case, Bowling argues that the affidavit of parentage was not signed by Shelton because it was forged by Monczunski and that the affidavit was therefore invalid under MCL 722.1003(2).

On appeal, Bowling introduces two new pieces of evidence he claims show that the affidavit of parentage was forged in this case. First, Bowling introduces an affidavit allegedly sworn by the notary who purportedly notarized Monczunski's and Shelton's signatures on the

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[1] MCL 722.1437(2) provides that "[a]n action for revocation under this section shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:

> (a) Mistake of fact.
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> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.

affidavit of parentage wherein the notary states that she did not notarize Shelton's signature. Second, Bowling introduces a criminal record for Monczunski that indicates that Monczunski was arrested for felony forgery and counterfeiting in summer 2013. Bowling claims that Monczunski was arrested for the forgery of the affidavit of parentage in this case. MCR 7.210 (A)(1) provides, in relevant part, that " . . . the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced . . . ." This Court has long stated that a party may not expand the record on appeal. *Trail Clinic, P C v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982); *Reeves v Kmart Corp*, 229 Mich App 466, 481; 582 NW2d 841 (1998); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Thus, this new evidence was not presented to the trial court and, therefore, this evidence is not properly before us. *Id.* Furthermore, nothing in the record indicates that the trial court prohibited Bowling from raising this evidence below. To the contrary, the trial court provided the parties every opportunity to present whatever evidence they chose to present. Additionally, Bowling does not argue that this evidence was unavailable to him at the time of trial. Because we are limited to facts presented in accordance with MCR 7.210(A)(1) and we are not a fact-finding Court, we decline consideration of this "evidence."

Bowling alternatively argues that even without the new evidence on appeal, the trial court should have questioned the validity of the affidavit of parentage based on the evidence presented at the evidentiary hearing. Again, the record evidence presented at trial was legally insufficient for this Court to reach such a conclusion. The notary did not testify before the trial court and none of the parties produced evidence apart from their testimony that the affidavit was fraudulent. Based on the parties' conflicting testimony of the certificates of live birth, we find that the trial court did not commit clear error in finding that the affidavit of parentage was not fraudulent based on the evidence presented to the trial court. *Moiles*, 303 Mich App at 65-66 (review is for clear error). And, based on the trial court's finding that the affidavit of parentage was signed by Monczunski and Shelton and also notarized, the trial court did not err in concluding that the affidavit of parentage in this case was a valid acknowledgment of parentage form under MCL 722.1003(2).

Bowling next argues that the trial court erred in refusing to revoke the affidavit of parentage under MCL 722.1443 because revocation was not in the minor child's best interests. In this case, the trial court applied the best-interest factors in MCL 722.1443(4) and found that revoking the affidavit of parentage in this case would be against the minor child's best interests. [2]

[2] Although not raised by Bowling, the trial court's application of MCL 722.1443(4) in this case could be construed as erroneous under this Court's decision in *Moiles*. In *Moiles*, this Court stated that "the trial court was not required to make a best-interests [sic] determination under MCL 722.1443(4) when revoking an acknowledgment of parentage." *Moiles*, 303 Mich App at 75-76. We further note this Court's decision in *Helton v Beaman*, ___ Mich App ___; ___ NW2d ___ (No. 314857, rel'd 2/4/14), and our dissenting colleague's findings in that case. Having reviewed *Helton* and *Moiles*, we reach a different conclusion than our dissenting colleague on this issue. While *Moiles* stands for the proposition that a trial court is not required

In this case, the trial court exercised its discretion under MCL 722.1443(2) not to revoke the acknowledgment of parentage. The trial court based that exercise of discretion on an extensive discussion of the facts of this case. The trial court placed that discussion of the facts within the schema of the best-interest factors under MCL 722.1443(4). As previously stated, we discern no inconsistency with substantial justice that would be caused by refusing to reverse the trial court's decision because it used the factors in MCL 722.1443(4). This is especially true because the Revocation of Parentage Act, as it is currently enacted, does not explicitly require a trial court to make any factual finding in support of its exercise of discretion relative to revoking an acknowledgement of parentage under MCL 722.1443(2). Yet, it is preferable that a trial court, as was done here, provide a factual discussion because those findings provide this Court with a basis to review a trial court's conclusion under MCL 722.1443(2). In this case, the trial court made exhaustive factual findings, in which we concur. Accordingly, Bowling fails to show clear error in the trial court's factual findings.

Finally we note that Bowling also argues that he has a due process right to a parenting relationship with the minor child. Bowling did not raise this constitutional claim before the trial court. This issue is unpreserved because it was not raised, addressed, or decided by the trial court. *Polkton Charter Twp*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Nevertheless, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010), lv den 489 Mich 970 (2011). This Court reviews an unpreserved claim of constitutional error for "plain error affecting the outcome of the proceeding." *Lima Twp v Bateson*, 302 Mich App at 503.

Our review of the record, lead us to conclude that Bowling has no constitutionally protected due-process rights in this case because while he is the minor child's biological father, he has no relationship with the minor child. See, *Sinicropi v Mazurek (After Remand)*, 279 Mich

to make a best interest determination, it did not state that a trial court is *prohibited* from doing so. 303 Mich App at 75-76. However, because the trial court was addressing the revocation of the affidavit of parentage in this case and not a paternity determination that a child is born out of wedlock, application of MCL 722.1443(4) may be considered error. See *Helton*, opinion of Judge K. F. KELLY, slip op. at pp. 5-8. Even if the application of MCL 722.1443(4) in this case was error, such error was harmless pursuant to MCR 2.613(A). Additionally, we do not concur with our dissenting colleague's statement " . . . that once it is established by clear and convincing evidence that the acknowledged father is not the biological father, as is the case here, the trial court must enter an order revoking the erroneous acknowledgment of paternity." In *Moiles*, this Court stated the difference between the facts presented in that case and those presented in *In Re Daniels' Estate*, 301 Mich App 450, 457; 837 NW2d 1 (2013), stating: "Rather, it [Daniels'] referred to the situation in which a man honestly, but mistakenly, believed that he was the biological father of a child and signed an acknowledgment of parentage so believing. In this case, as in *Daniels'*, the acknowledgement of parentage was executed with an honest belief that the parties to that acknowledgment were the biological parents. Thus, we do not read this Court's decision in *Moiles* to stand for the proposition that once the trial court found there was a mistake of fact it was obligated to revoke the acknowledgement of paternity.

App 455, 466-467; 760 NW2d 520 (2008) (holding that a biological father who has no relationship with his child has no constitutionally protected due-process rights in an action to revoke an acknowledgment of parentage). Bowling argues that he was prevented from developing a relationship with the minor child because of Monczunski's forged affidavit of parentage and Shelton's complete isolation of the child from Bowling under false and illegal pretenses. The trial court found otherwise and we concur. The record is clear that Bowling did not take independent action to establish paternity in the several years after Jeremiah's birth. Contrary to Bowling's argument on this issue where he relies heavily on Justice WHITE'S dissent in *Lehr v Robinson*, 463 US 248; 103 S Ct 2985; 77 L Ed 2d 614 (1983), we find more compelling the Supreme Court's decision in *Michael H v Gerald D*, 491 U S 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989).[3] In *Michael H*, the United States Supreme Court specifically rejected the notion that biological parenthood standing alone, or even in conjunction with some additional relationship, suffices to establish a liberty interest. 491 US at 123. Because Bowling's relationship to the minor child is purely biological, rather than parental, and otherwise wholly undeveloped, he has no constitutionally protected liberty interest that entitled him to due process of law. Accordingly, Bowling's constitutional argument fails to reveal plain error in this case. *Lima Twp*, 302 Mich App at 503.

Affirmed. No costs are awarded. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering

[3] See *Hauser v Reilly*, 212 Mich App 184, 188; 536 NW2d 865 (1995), wherein this Court concurred with Justice Brennan's reasoning in *Michael H* as outlined above.